

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

JOHN LOPER, an individual,

Plaintiff,

v.

CITY OF SEATTLE, a municipal corporation;
and MERRY O'CLEARY, an individual,

Defendants.

No.

COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF

COMES NOW Plaintiff, John Loper, and alleges as follows:

NATURE OF ACTION

This is an action to recover damages and to obtain declaratory and injunctive relief under 42 U.S.C. § 1983. The claims arise from the acts and omissions of a police officer of the Seattle Police Department who detained John Loper for selling the *Real Change* newspaper on a public sidewalk and threatened him with arrest for trespass under the City of Seattle's admonishment policy, and banished him from the area for one year. Mr. Loper remains at risk of arrest for returning to the public sidewalk from which he was "trespassed" and where he historically sold his newspapers.

I. PARTIES

1.1 Plaintiff John Loper is, and was at all material times, a resident of King County, Washington.

COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF - 1

No. _____

df110901

MACDONALD HOAGUE & BAYLESS
705 Second Avenue, Suite 1500
Seattle, Washington 98104
Tel 206.622.1604 Fax 206.343.3961

1 1.2 Defendant City of Seattle ("the City") is a municipal corporation organized under
2 the laws of the State of Washington and is located in the Western District of Washington.

3 1.3 Defendant Merry O'Cleary is a police officer in the Seattle Police Department and
4 a resident of the Western District of Washington. Officer O'Cleary committed all her acts and
5 omissions alleged below under color of state law.

6 II. JURISDICTION AND VENUE

7 2.1 The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331, 1334 and
8 1367.

9 2.2 Venue is appropriate in the Western District of Washington because all of the
10 events complained of occurred in this District, Plaintiff resides in this District, and the
11 Defendants reside in this District. *See* 28 U.S.C. §§ 1391(b).

12 III. FACTS

13 3.1 Plaintiff, John Loper, is a licensed vendor of the newspaper *Real Change*. *Real*
14 *Change* is a weekly newspaper that covers civic concerns including issues related to
15 homelessness.

16 3.2 *Real Change* provides copies of its newspaper to its licensed vendors at wholesale
17 cost. These vendors are not reimbursed for copies that are unsold. The vendors compete for
18 advantageous sales locations based on volume and seniority. Mr. Loper has historically sold *Real*
19 *Change* from the northwest corner of Second Avenue and Cherry Street in downtown Seattle,
20 Washington.

21 3.3 Offering the *Real Change* newspaper for sale is expressive conduct.

22 Defendant O'Cleary's Issuance of the City's Trespass Admonishment Against 23 Plaintiff

24 3.4 On September 9, 2009, Officer Merry O'Cleary of the Seattle Police Department
25 ("SPD") issued a written "Trespass Admonishment" to Mr. Loper. Officer O'Cleary recorded
26 the "Trespass Location" as "701 Second Avenue," which corresponds to the corner where
27 Mr. Loper has historically sold *Real Change* newspapers for many years at Second Avenue and

1 Cherry Street in Seattle. The Admonishment states that Mr. Loper is "no longer permitted,
2 invited, licensed or otherwise privileged to enter upon or remain at the above location," and that
3 "This Trespass Admonishment expires one year after its issuance." Officer O'Cleary signed the
4 admonishment against Mr. Loper.

5 3.5 Generally, the City's Trespass Admonishment form does not require the issuing
6 officer to articulate any reasonable suspicion or probable cause to support an allegation that the
7 person was engaged in the commission of any crime, including trespass. On the back side of the
8 Trespass Admonishment issued to Mr. Loper, however, Officer O'Cleary wrote: "Chronic
9 Problem. Bank owner requests trespass. Customers have complained about aggressive
10 panhandling at bank entrance (ATM & Bus Stop). I observed him approaching peds. stopping
11 them to sell papers."

12 3.6 At the time she issued the Admonishment to Mr. Loper, Officer O'Cleary told
13 him that he was not allowed to sell papers or be present on that corner or within a one-block
14 radius. Officer O'Cleary threatened that if she saw him on that corner again, she would arrest
15 him for trespass. Mr. Loper did not enter the bank, and Officer O'Cleary had no probable cause
16 or reasonable suspicion to believe that he had entered the bank that day or any other day, or that
17 he had committed any offense against the bank or any other crime.

18 3.7 Officer O'Cleary did not provide Mr. Loper with a copy of the Admonishment.
19 And even if she had, the Admonishment did not state a lawful reason for excluding him from the
20 public sidewalk or inform him of any appeals process, nor did it state which law he had
21 purportedly violated by "approaching peds. stopping them to sell papers" on a public sidewalk.

22 3.8 On December 1, 2009, Officer O'Cleary again observed Mr. Loper selling *Real*
23 *Change* newspapers on the sidewalk at the corner of Second Avenue and Cherry Street in
24 downtown Seattle. She ordered Mr. Loper to sit on the bumper of her patrol car and produce
25 identification. She did not inform Mr. Loper that he was free to leave. Officer O'Cleary then
26 used her Mobile Data Terminal (MDT) to run Mr. Loper's identification through police data
27

1 bases while keeping Mr. Loper seated on the patrol car. This lasted approximately 10-15
2 minutes. During that time, Mr. Loper was not free to leave, and did not do so.

3 3.9 On December 1, 2009, Officer O'Cleary did not have probable cause or
4 reasonable suspicion to believe that Mr. Loper was committing any crime, or that he had recently
5 done so. Her sole basis for seizing Mr. Loper was the Admonishment she had issued him on
6 September 9, 2009.

7 3.10 Nevertheless, on December 1, Officer O'Cleary instructed Mr. Loper that he was
8 banished from the entire area within one block of the intersection of Second Avenue and Cherry
9 Street. She warned Mr. Loper that if she saw him within a block of that intersection, she would
10 arrest him for trespass.

11 3.11 Immediately after receiving the December 1 banishment warning, Mr. Loper
12 entered a local sandwich shop, where he was welcome. Officer O'Cleary followed him into the
13 sandwich shop, this time accompanied by a King County Sheriff's Deputy. Together, the law
14 enforcement officers warned Mr. Loper that he was also barred from selling his *Real Change*
15 newspapers "near" any Metro bus stop in King County.

16 3.12 For more than a month after the December 1, 2009 banishment, Mr. Loper sold
17 newspapers on an adjacent corner. From his long experience selling *Real Change* newspapers at
18 this particular intersection, Mr. Loper knew that the neighboring corner was inferior for selling
19 newspapers to the location on the sidewalk outside 701 Second Avenue. True to Mr. Loper's
20 experience, he sold far fewer newspapers for that time period.

21 3.13 Officer O'Cleary was acting pursuant to City policy when she issued the Trespass
22 Admonishment and banishment order described herein.

23 3.14 As a direct result of Officer O'Cleary's Trespass Admonishment and subsequent
24 order and threat of arrest, Mr. Loper sold fewer newspapers and made less money. This lost
25 revenue constitutes financial damages caused by Defendants' actions.

26 3.15 The Defendants' Trespass Admonishment issued to Mr. Loper will be in effect
27 until September 9, 2010.

1 3.16 Due to the Trespass Admonishment in effect and Officer O'Cleary's threats,
2 Mr. Loper either forfeits his constitutional right of free speech or lives in constant fear of arrest if
3 he sells newspapers on the sidewalk at 701 Second Avenue.

4 **The City's Trespass Admonishment and Banishment Policies and Practices**

5 3.17 The City of Seattle maintains a policy and practice that permits its police officers
6 to issue "Trespass Admonishments" to a person in public areas without probable cause that the
7 person has committed any crime, including trespass.

8 3.18 The City of Seattle maintains a policy and practice that authorizes its police
9 officers to banish persons from general public areas through issuance of "Trespass
10 Admonishments" and threat of arrest. Once a Trespass Admonishment is issued, the City
11 authorizes its officers to banish a person from the "trespassed" area for up to one year from a
12 public area and from a private area without a determination whether the landowner owner
13 consents or does not consent to the presence of that particular person on his or her private
14 property.

15 3.19 The City, by and through its Trespass Admonishment system, policies and
16 practices, fails to give persons fair notice that his or her conduct is forbidden.

17 3.20 By policy and practice, the City of Seattle does not provide and opportunity to
18 contest the validity of a Trespass Admonishment or banishment order.

19 3.21 No legislative enactment authorizes Seattle Police Department officers to issue
20 Trespass Admonishments and banishment orders. The SPD's creation of the admonishment
21 system and banishment policy exceeds the permissible reach of police authority and violates the
22 separation of powers.

23 3.22 The City of Seattle's Trespass Admonishment policy and practice grants SPD
24 officers unfettered discretion to disperse or banish persons for lawful conduct, and to arrest
25 persons for trespass absent legal authority.
26
27

1 **IV. CAUSES OF ACTION**

2 **COUNTS ONE-THREE**

3 *(Claims Under 42 U.S.C. § 1983 Against Officer O'Cleary)*

4 4.1 As described above, the acts and omissions of Defendant O'Cleary, in her
5 capacity as a state actor, caused Plaintiff to be deprived of rights guaranteed by the First
6 Amendment to the United States Constitution, including the right to freedom of expression,
7 freedom of the press, and freedom of association and peaceable assembly, in violation of 42
8 U.S.C. § 1983.

9 4.2 As described above, the acts and omissions of Defendant O'Cleary, in her
10 capacity as a state actor, caused Plaintiff to be deprived of rights guaranteed by the Fourth
11 Amendment to the United States Constitution, including the right to be free from unreasonable
12 seizure of his person and effects, in violation of 42 U.S.C. § 1983.

13 4.3 As described above, the acts and omissions of Defendant O'Cleary, in her
14 capacity as a state actor, violated Plaintiff's rights guaranteed by the Fourteenth Amendment to
15 the United States Constitution, by depriving Plaintiff of his liberty and property without due
16 process of law in violation of 42 U.S.C. § 1983.

17 **COUNTS FOUR-FIVE**

18 *(Monell Action Against the City of Seattle)*

19 4.4 Defendant City of Seattle's Trespass Admonishment and banishment policies
20 have caused Plaintiff to be deprived of rights guaranteed by the First Amendment to the United
21 States Constitution, including the right to freedom of expression, freedom of the press, and
22 freedom of association and peaceable assembly, in violation of 42 U.S.C. § 1983.

23 4.5 Defendant City of Seattle's Trespass Admonishment and banishment policies and
24 practices caused Plaintiff's rights guaranteed by the Fourteenth Amendment to the United States
25 Constitution, to be violated by depriving Plaintiff of his liberty and property without due process
26 of law in violation of 42 U.S.C. § 1983.

V. PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests relief as follows:

5.1 Compensatory damages;

5.2 Declaratory relief that the City of Seattle's "Trespass Admonishment" and banishment policies and practices are unconstitutional;

5.3 Injunctive relief enjoining the City of Seattle from enforcing the Trespass Admonishment and banishment order against Plaintiff described herein and from issuing them to him and others in the future;

5.4 Punitive damages from the individual Defendant;


5.5 Costs, including reasonable attorneys' fees under 42 U.S.C. § 1988 and to the extent otherwise permitted by law;

5.6 The right to conform the pleadings to the proof offered at trial; and

5.7 Such other relief as may be just.

DATED this 11th day of June, 2010.

MacDONALD HOAGUE & BAYLESS

By 

Jesse Wing, WSBA # 27751

Joe Shaeffer, WSBA # 33273

David Whedbee, WSBA # 35977

Attorneys for Plaintiff